UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Initial Public Offering Securities Litigation	:	**OPINION AND ORDER**
	:	**21 MC 92 (SAS)**
This Document Relates To: All Cases	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

The question addressed here, in what appears to be a matter of first impression, is whether Wells submissions to the Securities and Exchange Commission are discoverable in subsequent civil litigation. Ten years ago, the United States Court of Appeals for the Second Circuit held that Wells submissions are not entitled to work product protection.[1] Their discoverability

[1] See In re Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) ("At the time of the submission of the memorandum to the [SEC's] Enforcement Division, the SEC and Steinhardt stood in an adversarial position. Steinhardt's voluntary submission of the memorandum to the Enforcement Division waived the protections of the work product doctrine as to subsequent civil litigants seeking the memorandum from Steinhardt."). Although the Court of Appeals expressly declined to characterize the memorandum at issue in Steinhardt as a Wells submission, id. at 232, the description of the memorandum makes clear that Steinhardt's holding applies with full force to Wells submissions. In any event, the defendants in the instant case do not assert work product protection. See 10/10/03 Letter from Robert B. McCaw, counsel to Underwriter Defendants, to the Court ("McCaw Ltr.") at 3 n.4 ("Steinhardt Partners turned on the validity of an asserted work product protection for a Wells Submission. The Underwriter Defendants, however, do not rely on that argument here.").

has not been addressed since then. For the reasons discussed below, I conclude that Wells submissions are not protected from discovery merely because they may contain an offer of settlement.

I. BACKGROUND

A. The Wells Process

Since 1973, the SEC has permitted targets of its investigations to file "Wells submissions" -- so named because New York lawyer John A. Wells chaired the SEC Advisory Committee on Enforcement Policies and Practices that initially recommended the practice[2] -- to respond to contemplated charges:[3]

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[2] The other members of the "Wells Committee" were former SEC Chairman Manuel F. Cohen and former SEC Commissioner Ralph H. Demmler. See Arthur F. Mathews, Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings, 24 Emory L.J. 567, 618 n.172 (1975). The current Wells process originated from an internal SEC memorandum three years earlier, which requested that "[i]n regard to both administrative proceedings and injunctive actions, . . . the staff's memoranda to the Commission recommending the particular action set forth separately any arguments or contentions as to either the facts or the law involved in the case which have been advanced by the prospective respondents and which countervail those made by the staff. . . ." Memorandum from the Commission, to All Division Directors and Office Heads, re Procedures Followed in the Institution of Enforcement Proceedings (Sept. 1, 1970) (reprinted in SEC v. National Student Mktg. Corp., 68 F.R.D. 157, 166 (D.D.C. 1975)).

[3] See Commencement of Enforcement Proceedings and Termination of Staff Investigations, SEC Securities Act Release No. 5310 (Feb. 28, 1973), available at 1973 WL 149252. The SEC found authority for the Wells procedure in section 21(a) of the Securities Exchange Act, see id. at n.2, which provides: "The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or

> Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. . . . In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.[4]

Prior to 1973, the Commission only advised prospective targets of potential charges and the opportunity to file a written submission when defense counsel requested notice.[5] As a result, veterans of the regulatory process filed written rebuttals to contemplated charges while neophyte counsel never realized that they had the opportunity to present their client's position to the Commission before charging decisions were made.[6] The Wells process was implemented so that the Commission would have the opportunity to hear a defendant's arguments before deciding

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regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all facts and circumstances concerning the matter to be investigated." 15 U.S.C. § 78u(a)(1). See also 15 U.S.C. § 77t(a) (analogous provision of the Securities Act).

[4] 17 C.F.R. § 202.5(c).

[5] See Mathews, Effective Defense at 620.

[6] As the Wells Committee noted, as "a practical matter, only experienced practitioners who are aware of the opportunity to present their client's side of the case have made general use of these procedures." Id. (quoting Report of the Securities and Exchange Commission's Advisory Committee on Enforcement Policies and Practices (SEC June 1, 1972)).

whether to go forward with enforcement proceedings, in every case.

The Wells process is relatively straightforward. Targets of SEC investigations are notified whenever the Enforcement Division staff decides, even preliminarily, to recommend charges.[7] The staff typically identifies the provisions of the federal securities law that it intends to charge, the forum in which the enforcement action will proceed (e.g., district court or administrative action), and the relief it intends to seek.[8] Defense counsel then often request a "Wells meeting," at which the staff presents a more detailed account of its case: their view of the relevant facts, the applicable law, and their theory of any violations. The Wells meeting is less a forum for defense counsel to obtain discovery of the Commission's case than it is a dialogue in which defense counsel can appreciate whether there are any issues -- factual, legal, or otherwise -- that may affect the Commission's deliberative

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[7] See Gary G. Lynch & Katherine M. Choo, Wells Submissions: Effective Representation Following the Completion of the Staff's Investigation, 703 PLI/Corp 373, 381 (Advanced Securities Law Workshop 1990). "Exceptions to this general rule usually occur in situations where the staff intends to seek a temporary restraining order to prevent dissipation or removal of assets, or to seek other emergency relief which would be imperiled by giving advance notice to the prospective defendant or respondent." Id.

[8] See id.

process.[9] The target may then file its Wells submission.

B. The Commission's Investigation and the Instant Dispute

On December 6 and 7, 2000, the Wall Street Journal ran a series of reports charging that investment banks required their customers to buy shares of stock in the aftermarket as a condition of receiving initial public offering stock allocations -- a practice known as "laddering."[10] The SEC, along with the United States Attorney's office in this District, commenced investigations into IPO allocation and IPO commission practices at about the same time these reports were published.[11]

The Commission served subpoenas on a number of investment banks seeking information about the banks' underwriting practices, how they priced and allocated offerings, and their commissions. The SEC eventually sent Wells notices,[12] advising certain of the investment banks that it was considering

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[9] See id. at 381-82.

[10] Susan Pulliam & Randall Smith, Trying to Avoid the Flippers, Wall St. J., Dec. 6, 2000, at A1; Susan Pulliam & Randall Smith, U.S. Probes Inflated Commissions for Hot IPOs, Wall St. J., Dec. 7, 2000, at C1.

[11] See Pulliam & Smith, U.S. Probes Inflated Commissions.

[12] My description of the SEC's investigation in these cases is intentionally vague because it is drawn from the Underwriters' Wells submissions, which have been submitted for the Court's in camera review. Because these submissions contain highly sensitive information, I provide only that background information necessary for an understanding of the instant dispute. In any case, the investigation of each Underwriter was different, and the facts peculiar to each one are unimportant.

charges of, among other things, section 10(b) of the Securities Act of 1933 and Rule 10b-5 promulgated thereunder[13] -- the securities laws' catch-all fraud provision. In short, the Commission alleged that the banks had induced their customers to agree to purchase aftermarket shares of securities in return for allocations of the IPOs, with the intent of manipulating the market for those securities.

Approximately one month after the Wall Street Journal articles were published, the first complaint in this action was filed.[14] The allegations in these actions have been exhaustively described in the Court's previous opinions, familiarity with which is assumed.[15] For purposes of this Opinion, it is enough to note that these cases allege essentially the same conduct that the SEC was investigating. Plaintiffs are now seeking discovery of the Underwriters' Wells submissions. By Order dated October 22, 2003, the Court undertook an in camera review of the submissions.[16]

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[13] See 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

[14] See Makaron v. VA Linux Sys., Inc., 01 Civ. 242 (filed Jan. 11, 2001).

[15] See In re Initial Public Offering Sec. Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003).

[16] See Order, In re Initial Public Offering Sec. Litig., No. 21 MC 92 (S.D.N.Y. Oct. 22, 2003).

II. DISCUSSION

The Underwriters contend that Wells submissions are settlement materials, discovery of which requires a "particularized showing of relevance that Plaintiffs cannot satisfy."[17] Neither of these contentions are correct. Wells submissions are not -- or at least, not intrinsically -- settlement materials. And in any case, the discovery of settlement materials is not governed by a different standard than other documents under the Federal Rules of Civil Procedure. Because plaintiffs have made the minimal showing of relevance required under the Rules, they are entitled to discovery of the Wells Submissions.

A. Wells Submissions Are Not Settlement Materials

Defense attorneys have many reasons for filing a Wells submission, including persuading the Enforcement Division staff: (1) not to recommend an enforcement action; and (2) to drop certain charges, change the forum for the enforcement action, or request different relief. Even if the staff does recommend an enforcement action, a Wells submission may be used to persuade the Commission (1) to reject the staff's recommendation; or (2) to settle the case on terms more favorable to the client than those recommended by the staff.[18]

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[17] McCaw Ltr. at 3.

[18] See Lynch & Choo, Effective Representation, at 383.

The Commission, however, has been unequivocal in its view of the purpose of Wells submissions:

> Where a disagreement exists between the staff and a prospective respondent or defendant as to factual matters, it is likely that this can be resolved in an orderly manner only through litigation. Moreover, the Commission is not in a position to, in effect, adjudicate issues of fact before the proceeding has been commenced and the evidence placed in the record. In addition, where a proposed administrative proceeding is involved, the Commission wishes to avoid the possible danger of apparent prejudgment involved in considering conflicting contentions, especially as to factual matters, before the case comes to the Commission for decision. Consequently, submissions by prospective defendants or respondents will normally prove most useful in connection with questions of policy, and on occasion, questions of law, bearing upon the question of whether a proceeding should be initiated, together with considerations relevant to a particular prospective defendant or respondent which might not otherwise be brought clearly to the Commission's attention."[19]

Nonetheless, sophisticated counsel will use Wells submissions as an opportunity to present the target's view of the facts, as well as the law.[20] More importantly for purposes of this Opinion, counsel also often use Wells submissions as an opportunity to

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[19] Securities Act Release No. 5310, available at 1973 WL 149252, at *2 (emphasis added).

[20] See Lynch & Choo, Effective Representation, at 379 ("[T]he above recommendations should not be followed by counsel. While it is always helpful to discuss policy or law if there are sound arguments which can be asserted, generally the prospective defendant's or respondent's version of the facts should be set forth and, where appropriate, the evidence supporting the asserted version of the facts should be discussed.").

present an explicit offer of settlement with the Commission.[21]

Offers of settlement, however, are not intrinsically part of Wells submissions, which were intended to be "memoranda to the SEC presenting arguments why an enforcement proceeding should not be brought."[22] To the extent that a respondent may make a settlement offer, that offer is typically clearly identified and thus easily severable from the remainder of the

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[21] See Mathews, Effective Defense, at 623 ("It may be useful to prepare a Wells Committee submission containing a tailor-made offer of settlement to a particular type of enforcement action, and the reasons why it would be in the public interest for the Commission to dispose of the case in that manner."). Notwithstanding the Commission's recommendation that Wells submissions focus on whether charges should be initiated, SEC policy permits offers of settlement at any point during or after an investigation. See 17 C.F.R. § 202.5(f) (authorizing SEC staff to "discuss with persons involved [in the Wells process] the disposition of such matters by consent, by settlement, or in some other manner."); see also id. § 201.240 ("Any person who is notified that a proceeding may or will be instituted against him or her, or any party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.").

[22] In re Towers Fin. Corp. Noteholders Litig., No. 93 Civ. 0810, 1995 WL 571888, at *10 n.10 (S.D.N.Y. Sept. 20, 1995) (quoting SEC v. Forma, 117 F.R.D. 516, 519 (S.D.N.Y. 1987)). See also Kenneth B. Winer & Samuel J. Winer, Effective Representation in the SEC Wells Process, 34 Rev. Sec. & Commodities Reg. 59, 60 (2001) (stating that the Wells process is "the most critical phase in an SEC investigation" because it "provides a valuable opportunity to persuade the Staff or the Commission that the Staff's understanding of the matter is either incorrect or incomplete and that the indicated enforcement action should not be instituted."); Lewis B. Merrifield III, Investigations by the Securities and Exchange Commission, 32 Bus. Law. 1583, 1624 (1977) ("The preparation of the Wells' Committee Submission is crucial. It is the last clear change to avoid time-consuming and debilitating formal proceedings.").

submission.[23] In short, Wells submissions are not in themselves settlement material, although they may sometimes contain offers of settlement.[24]

The above description of Wells submissions was confirmed by my in camera review of the submissions in this case. I examined each Wells submission, including reading several in their entirety. Each consisted primarily of an argument as to why the particular bank should not be charged in an enforcement proceeding. Although some of the submissions may also propose settlement terms, no submission is exclusively a settlement offer.

B. The Scope of Discovery Permitted by Rule 26(b)(1) Is Not Limited by Federal Rule of Evidence 408

Even supposing that Wells submissions are offers of compromise, this should not affect their discoverability. The only federal rule addressing settlement materials is Federal Rule of Evidence 408, "Compromises and Offers to Compromise":

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or

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[23] See Joshua A. Naftalis, Note, "Wells Submissions" to the SEC as Offers of Settlement Under Federal Rule of Evidence 408 and their Protection From Third-Party Discovery, 102 Colum. L. Rev. 1912, 1925 (2002).

[24] The argument to the contrary is advanced in Naftalis, "Wells Submissions" to the SEC as Offers of Settlement. See also In re Allied Stores Corp., SEC Release No. APR-293 (Mar. 21, 1988), available at 1988 WL 357006 (Administrative Law Judge holding that Wells submissions are inadmissible in an enforcement proceeding because they are settlement materials).

> promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[25]

The rule says nothing about whether offers of compromise are discoverable; it speaks only to their admissibility. More importantly, the bar on admission of settlement materials is not absolute. Though offers of settlement are inadmissible as direct evidence of liability or damages, they may be admitted for a variety of other purposes, such as to impeach a witness.

This makes perfect sense. An "offer may be motivated by a desire for peace rather than from any concession of weakness of position."[26] In other words, just because a party agrees to settle does not mean that it is actually liable; similarly, just because it agrees to settle for a certain amount does not mean that amount represents the actual value of the claims.[27]

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[25] Fed. R. Evid. 408 (emphasis added).

[26] Fed. R. Evid. 408, Advisory Committee Note.

[27] It is helpful to recall that the original purpose of Rule 408 was to codify the common law bar on litigants using

While Rule 408 is the only federal rule to address settlement material, it is a rule governing the admissibility of evidence, not the discovery of relevant information prior to trial. Federal Rule of Civil Procedure 26, which does govern discovery, is quite broad and permits

> discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.[28]

Two points are noteworthy. First, Rule 26 requires only a showing of relevance in order to obtain discovery. Second, the Rule specifically permits discovery of inadmissible information, so long as that information may lead to the discovery of admissible evidence. Thus, admissibility is not a prerequisite to discoverability, and the scope of relevance under Rule 26 is

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offers of settlement as evidence of liability in that action. See Insurance Cos. v. Weides, 81 U.S. (14 Wall.) 375, 381 (1872) ("A compromise proposed or accepted is not evidence of an admission of the amount of the debt."); see also West v. Smith, 101 U.S. 263, 272-73 (1879) (holding that a mere offer of compromise cannot prejudice the rights of plaintiff); Home Ins. Co. v. Baltimore Warehouse Co., 93 U.S. 527, 548 (1876) (holding that an offer of compromise by defendant's agent is not admissible). For example, a plaintiff could not argue to a jury that the defendant was liable by virtue of the fact that the defendant made an offer to settle the very case being tried. Nor could a defendant argue that a plaintiff's damages are limited because she offered to settle for an amount less than what she is seeking from the jury.

[28] Fed. R. Civ. P. 26(b)(1).

broader than under the Rules of Evidence.[29]

This is not merely a matter of academic interest. Rule 408 is a rule of relevance,[30] and the Advisory Committee's Note makes clear that evidence of an offer of settlement "is irrelevant," at least as direct evidence of liability or damages.[31] If the limits of relevance in the discovery and evidentiary contexts were coterminous, then offers of settlement would be, by definition, immune from discovery. Because the standards of relevance are different, however, Rule 408 does not bar discovery of offers of settlement under Rule 26, so long as the settlement material may reasonably lead to the discovery of admissible evidence.

Discovery of settlement materials is permissible for

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[29] Compare Fed. R. Civ. P. 26(b)(1) (defining relevant evidence to include inadmissible evidence) with Fed. R. Evid. 402 (defining relevance as a prerequisite to admissibility). Indeed, "relevance" is an expansive concept, and may have very different meanings in different contexts. See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108-09 (2d Cir. 2002) ("Although we have stated that, to obtain an adverse inference instruction, a party must establish that the unavailable evidence is 'relevant' to its claims or defenses, our cases make clear that 'relevant' in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that 'the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.'") (citations, footnote, and alterations omitted).

[30] Rule 408 falls within Article IV of the Rules of Evidence, titled "Relevance and its Limits."

[31] Fed. R. Evid. 408, Advisory Committee Note.

another reason. Rule 408 contains an explicit exception to its bar on the admissibility of settlement materials when those materials are being used for some purpose other than as direct proof of liability or damages. Thus, settlement materials are admissible -- and so, discoverable -- if they bear on those collateral matters.[32]

Accordingly, Wells submissions, regardless of whether they contain settlement materials under Rule 408, are discoverable so long as they (1) are admissible, because they are relevant to a claim or defense,[33] or (2) will reasonably lead to the discovery of admissible evidence.[34]

Nonetheless, a number of courts have held that

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[32] See, e.g., ABF Capital Mgmt. V. Askin Capital Mgmt., No. 95 Civ. 8905, 2000 WL 191698, at *2 (S.D.N.Y. Feb. 10, 2000) (stating that settlement material is discoverable when it is relevant to "the settling parties' bias, interest, or prejudice"); Tribune Co. v. Purcigliotti, No. 93 Civ. 7222, 1996 WL 337277, at *2 (S.D.N.Y. June 19, 1996) (permitting discovery of "settlement-related documents primarily for their impeachment value").

[33] Of course, consistent with Rule 408, a party may not argue that a Wells submission is relevant by virtue of the fact that an offer of settlement contained therein is itself evidence of liability or damages.

[34] Notably, this result is consistent with the SEC's position regarding Wells submissions, namely, that they "may be used as evidence in subsequent proceedings for impeachment or corroborative purposes or as admissions by a party opponent." William R. McLucas et al., A Practitioner's Guide to the SEC's Investigative and Enforcement Process, 70 Temple L. Rev. 53, 115 (1997). See also Allied Stores Corp., 1988 WL 357006 (SEC arguing for the admissibility of Wells submissions in an enforcement proceedings).

settlement materials require a particularized showing of relevance before they may be discovered.[35] The heightened requirement is typically justified by policy concerns:

> Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.[36]

This is certainly an important policy, and one that Congress was mindful of when Rule 408 was promulgated.[37] Yet even in those cases that require a heightened showing -- and there are at least as many that do not[38] -- this public policy has only justified a

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[35] See, e.g., SEC v. Thrasher, No. 92 Civ. 6987, 1996 WL 94533, at *2 (S.D.N.Y. Feb. 27, 1996); Matsushita Elecs. Corp. v. Loral Corp., No. 92 Civ. 5461, 1995 WL 527640, at *4 (S.D.N.Y. Sept. 7, 1995); Riddell Sports, Inc. v. Brooks, No. 92 Civ. 7851, 1995 WL 20260, at *1 (S.D.N.Y. Jan. 19, 1995); Morse/Diesel, Inc. v. Fidelity & Deposit Co., 122 F.R.D. 447, 451 (S.D.N.Y. 1988). No court has so held in the particular context of Wells submissions.

[36] Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

[37] The Advisory Committee's Note to Rule 408 explains that a "consistently impressive ground [for exclusion of settlement materials] is promotion of the public policy favoring the compromise and settlement of disputes." Fed. R. Evid. 408, Advisory Committee Note.

[38] See, e.g., Johnson Matthey, Inc. v. Research Corp., No. 01 Civ. 8115, 2003 U.S. Dist. LEXIS 11422, at *7 (S.D.N.Y. June 12, 2003); Griffin v. Mashariki, No. 96 Civ. 6400, 1997 WL 756914, at *1 (S.D.N.Y. Dec. 8, 1997); Salgado v. Club Quarters, Inc., No. 96 Civ. 383, 1997 WL 269509, at *1 (S.D.N.Y. May 20, 1997); SEC v. Downe, No. 92 Civ. 4092, 1994 WL 23141, at *6

"modest presumption against disclosure."[39] But the Federal Rules of Civil Procedure do not permit even this "modest presumption"; they permit the discovery of "any matter . . . that is relevant."[40] Thus, if settlement material is to be shielded from discovery, it must find protection from some provision other than Rule 26(b).[41]

C. The Underwriters' Wells Submissions Are Relevant and Therefore Discoverable

The only question that remains, then, is whether the Underwriters' Wells submissions are relevant to any of the claims

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(S.D.N.Y. Jan. 27, 1994).

[39] Thrasher, 1996 WL 94533, at *2.

[40] Fed. R. Civ. P. 26(b)(1) (emphasis added).

[41] For example, settlement material could be shielded from discovery via a protective order. See Fed. R. Civ. P. 26(c) (permitting a court to order that "discovery not be had" if it would cause annoyance or embarrassment or be unduly burdensome or oppressive). Some courts, for example, have worried that permitting discovery of settlement material might jeopardize ongoing settlement discussions; in such a case, producing the settlement offer could pose an undue burden on the parties. Cf. United States v. American Soc'y of Composers, Authors & Publishers, No. Civ. 13-95, 1996 WL 157523, at *3 (S.D.N.Y. Apr. 3, 1996) (holding that a heightened showing of relevance is required only when settlement talks are ongoing, for fear that discovery could chill those ongoing negotiations). A protective order might also be warranted in the case of "true" settlement offers -- documents that serve no purpose other than conveying an offer to compromise -- because their discovery could, in certain cases, be "embarrassing." Fed. R. Civ. P. 26(c).

In any case, and in apparent recognition of the fact that discovery of the Wells submissions at issue here poses neither undue burden nor a risk of embarrassment or annoyance, Underwriters have not moved for a protective order.

or defenses in these actions. There can be no serious doubt that they are. Underwriters' only argument to the contrary is that "production of Wells Submissions may well lead to rediscovery of documents already produced."[42] But if it is true that the Wells submissions contain nothing but duplicative discovery, it is unclear why defendants object to their production. Indeed, production of the Wells submissions would be absolutely no burden to Underwriters, who have already produced them to the Court. That being so, the Wells submissions' alleged redundancy is of no moment.

The important point is that these Wells submissions were drafted precisely to address, and rebut, the same charges that plaintiffs raise here. In particular, plaintiffs point out -- and the Court's in camera review confirms -- that the Wells submissions are relevant to: "(i) how the defendants allocated IPO shares; (ii) the participation of senior management in the allocation practices; (iii) the awareness of senior management with respect to those practices and what, if anything, defendants' compliance personnel did in response to such knowledge; and (iv) the [alleged] unlawful quid pro quo extracted

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[42] McCaw Ltr. at 5 (emphasis in original). Underwriters also assert that "production of Wells Submissions would provide Plaintiffs with a detailed account of the Underwriter Defendants' litigation strategy. . . ." Id. But this is nothing more than a work product objection, which the Second Circuit has already clearly held is inapplicable to Wells Submissions. See Steinhardt, 9 F.3d at 236.

by the defendants in return for IPO allocations."[43]

IV. CONCLUSION

For the foregoing reasons, Underwriters are ordered to produce their Wells submissions to plaintiffs on or before January 20, 2004. Any disputes that may arise from this production are referred to Professor Dan Capra, the Court-appointed discovery master.[44]

SO ORDERED:

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Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
December 24, 2003

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[43] 10/14/03 Letter from Robert A. Wallner, liaison counsel for plaintiffs, to the Court at 3.

[44] For example, there may be an issue as to redacting irrelevant material, see McCaw Ltr. at 5 n.8, or the need for confidentiality as to some or all of the submissions, see id. at 6 n.9.

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